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No. 04-

IN THE
Supreme Court of the United States

MICHAEL ANCONA,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Connecticut

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. When, on direct review of a criminal conviction, a state supreme court finds that prosecutorial misconduct has occurred in closing argument, may the state supreme court affirm the conviction without first requiring the state to prove, under *Chapman v. California*, 386 U.S. 18 (1967), that the misconduct was harmless beyond a reasonable doubt?

II. Whether a petitioner's right to due process of law is violated when a state supreme court reviews a claim of prosecutorial misconduct in closing argument, under a standard that appears to incorporate elements of the harmless error test of *Chapman v. California*, 386 U.S. 18 (1967), but which does not place any burden on the prosecution to prove the harmlessness of the misconduct?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

The petitioner, Michael Ancona, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Connecticut Supreme Court, rendered on August 24, 2004.

OPINIONS BELOW

The opinion of the Connecticut Supreme Court, upon a grant of certification, is officially reported at 270 Conn. 568 (2004), and is reprinted in the Appendix to this petition, at pp. 1a-49a. The opinion is unofficially reported at 854 A.2d 718.

The opinion of the Connecticut Appellate Court, on petitioner's direct appeal, is officially reported at 69 Conn. App. 29 (2002), and is reprinted in the Appendix to this petition, at pp. 50a-62a. The opinion is unofficially reported at 797 A.2d 1138 (2002).

JURISDICTION

The judgment of the Connecticut Supreme Court was entered on August 24, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a), on the grounds that the State of Connecticut has violated the petitioner's rights under the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part: "... nor shall any State deprive any person of life, liberty or property, without due process of law; ...."

Conn. Gen. Stat. § 53a-48(a) provides: "A guilty is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy."

Conn. Gen. Stat. § 53a-60(a) provides in relevant part: "A person is guilty of assault in the second degree when . . . (2) with intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument other than by means of the discharge of a firearm . . . ."

Conn. Gen. Stat. § 53a-60a provides in relevant part: "(a) A person is guilty of assault in the second degree with a firearm when he commits assault in the second degree as provided in section 53a-60, and in the commission of such offense he uses or is armed with and threatens the use of or displays or represents by his words or conduct that he possesses a pistol, revolver, machine gun, shotgun, rifle or other firearm . . . ."

Conn. Gen. Stat. § 53a-155 provides in relevant part: "A person is guilty of tampering with or fabricating physical evidence if, believing that an official proceeding is pending, or about to be instituted, he . . . (2) makes, presents or uses any record, document or thing knowing it to be false and with purpose to mislead a public servant who is or may be engaged in such official proceeding."

Conn. Gen. Stat. (Rev. to 1997) § 53a-180(a) provides in relevant part:"A person is guilty of falsely reporting an incident when, knowing the information reported, conveyed or circulated to be false or baseless, he . . . (3) gratuitously reports to a law enforcement officer or agency. . . (C) false information relating to an actual offense or incident or to the alleged implication of some person therein."

STATEMENT OF THE CASE

This case arose from an incident involving a high-speed chase of a motorist, by police officers, and the alleged assault of the motorist after he was apprehended. The incident occurred on February 14, 1997, at which time the petitioner was a police officer with the Hartford, Connecticut, police department. After being apprehended, the motorist complained that he had been assaulted by the police. Following a police investigation, the petitioner was one of several officers to be prosecuted for either participating in the alleged assault, or attempting to "cover up" their involvement.

The petitioner was charged with five criminal offenses. After a trial to a state jury, he was acquitted of two assault charges, but convicted of fabricating physical evidence (Conn. Gen. Stat. § 53a-155(a)(2)), conspiracy to fabricate physical evidence (Conn. Gen. Stat. §§ 53a-48(a) and 53a-155(a)(2)), and falsely reporting an incident (Conn. Gen. Stat. (Rev. to 1997) § 53a-180(a)(3)(C)). He was sentenced to five years imprisonment, execution suspended after six months, and four years of conditional discharge, and was fined $5,000.

The petitioner appealed to the Connecticut Appellate Court. On April 9, 2002, that court concluded that "egregious prosecutorial misconduct [in closing and rebuttal arguments] so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Ancona*, 69 Conn. 29, 41 (2002) (hereafter "*Ancona I*", at App. 62a). The Appellate Court reversed petitioner's convictions and remanded for a new trial. Id.

Following the issuance of the Appellate Court's opinion, the state-respondent sought certification to appeal to the Connecticut Supreme Court. The court granted certification, limited to the following issue: "Did the Appellate Court properly conclude that prosecutorial misconduct in the closing

and rebuttal arguments deprived the defendant of due process of law?" *State v. Ancona*, 260 Conn. 928, 798 A.2d 970 (2002) (Order granting certification).

In an opinion released on August 24, 2004, the Connecticut Supreme Court reversed the judgment of the Appellate Court, and remanded the case to the Appellate Court with direction to affirm the judgment of the trial court. *State v. Ancona*, 270 Conn. 568, 618 (2004) (hereafter *Ancona II*, at App. 49a). Although the Connecticut Supreme Court agreed that "some of the state's attorney's remarks were improper," id., 581-82, App. 12a, it nevertheless concluded that "there is no reasonable likelihood that the state's attorney's misconduct compromised the defendant's right to a fair trial." Id., at 618, App. 49a..

I. STATE TRIAL COURT PROCEEDINGS

The questions presented by this petition are not fact-specific, and therefore a brief summary of the case should provide sufficient background for the petitioner's legal claims.

A. The Chase and Apprehension: On the night of February 14, 1997, two Hartford police officers were on drug surveillance duty, when they observed suspicious conduct by a motorist in a pickup truck. When one of the officers approached the truck, which was parked with its engine running, but its lights turned off, the driver, James Wilson, "drove away at a high rate of speed," and the officers took off in pursuit. Wilson drove through an intersection without stopping, and soon, other officers from Hartford, and from the adjoining town of Bloomfield, Connecticut, were chasing the truck. *Ancona II*, 582-3, at App. 12a-13a. At least nine officers were involved in the chase or its aftermath.

"The chase ended when Wilson pulled his vehicle onto the curb directly across the street from the Bloomfield police department. Driscoll and Michaud were the first officers to

arrive, and the other officers from the Hartford and Bloomfield police departments arrived shortly thereafter. As those other officers were arriving, Driscoll exited his vehicle and ran to the cab of the pickup truck. Wilson opened the driver's side door of the cab, and Driscoll pulled him out, forcing him toward the back of the truck. Wilson did not resist Driscoll's use of force when Driscoll removed him from the truck." Id., 583, App. 14a.

"As Driscoll was placing Wilson on the ground to handcuff him, the [petitioner] ran over to Wilson with his gun drawn. Middleton also ran over to Wilson and struck Wilson twice in the back with the butt of her service revolver. Michaud then approached Middleton to assist in the arrest. However, Driscoll, who was supervising Michaud, a police trainee, grabbed Michaud by the back of her jacket and pulled her away. Wilson subsequently was handcuffed. O'Callaghan thereafter placed Wilson in one of the Hartford police cruisers." Id.., App.14a.

Some of the events were captured on videotape by a camera "affixed to the dashboard of Lazarus' cruiser." Id., 583, App. 14a. The videotape showed Driscoll removing Wilson from the pickup truck, and the petitioner running toward the truck. It also showed the petitioner "raising his handgun in the air and then bringing it down swiftly in the area where Wilson, who was on his hands and knees, was located. It cannot be discerned from the videotape, however, where the [petitioner]'s gun made contact with Wilson's body." Id., 583-84, App. 14a.

"Wilson sustained a serious laceration over his right eye and other lacerations to his head and scalp, abrasions and cuts on his right hand, bruises on his left thigh and left shoulder, and significant swelling around his right eye. During the ambulance ride to the hospital, Wilson was complaining that the police had beaten him. The Hartford police issued Wilson a summons for one or more motor vehicle infractions, but he was not charged with committing a crime." Id., 584, App. 15a.

B. The Police Reports: After the incident, the petitioner filed a report, in which he indicated, inter alia, that he saw Wilson struggling with, and punch, Officer O'Callaghan; that Wilson punched the petitioner twice with a closed fist, and that officers had to use force ("arm locks and baton strikes") to subdue and put handcuffs on Wilson. Id., 584-85.

O'Callaghan's report "corroborated the [petitioner]'s account of the incident in significant respects." Id., 585. His report stated that Wilson was combative, in "A BOXER STANCE" (Capitalization in original.), and that he and Wilson struggled and exchanged blows. In addition, "'several officers had to hold [Wilson] [d]own until he was placed in handcuffs.'" Id., 585-86.

Officer Middleton's report indicated that Wilson "charged toward O'Callaghan and then 'began to fight him,'" and that she and petitioner "intervened because they 'were not sure if Officer O'Callaghan was injured.'" Id., 586.

C. The Investigation: Wilson complained that he had been assaulted, and after a police investigation, three officers were charged. Id., 586 and n.23. Officer Middleton was acquitted of all charges, and Officer O'Callaghan "pleaded guilty, under a plea agreement, to falsely reporting an incident, conspiring to falsely report an incident and filing a false statement." Id., 586 n. 23. The petitioner was tried alone.

D. The State's Case: The state's theory was that petitioner and other officers used "excessive and unnecessary force during Wilson's arrest and, further, that the [petitioner] and other officers had attempted to cover up their assault by submitting false incident reports." Id., 586-7. Numerous officers testified for the prosecution. For example, one officer testified that he saw Wilson struggling with Hartford officers, and thought that Wilson was resisting arrest." Id., 587. Another

testified that Wilson did not resist arrest and that the Hartford officers beat Wilson. Id., 587. A Bloomfield police trainee saw a "uniformed arm strike Wilson in the back with a black object," and heard an angry female officer say, ""don't you ever."" Id., 587-8. Yet another officer was unable to identify the police officers who struck Wilson, while another trainee identified petitioner from a photographic array as the officer who struck Wilson in the head with a gun. Id., 588.

Officer O'Callaghan testified for the state in accordance with his plea agreement. Id., 589 n. 25 He testified about certain inaccuracies in the reports filed by the Hartford officers, and acknowledged striking Wilson with a baton. Id., 588-89. He also testified that after the incident, the petitioner told him that he "previously had been 'involved with internal affairs, and that he had been in a couple of situations and he didn't want to be involved with this one.' According to O'Callaghan, the [petitioner] asked him to write a report that would 'justify' Wilson's injuries." O'Callaghan also "agreed to state in his report," inter alia, that "he was the first officer to arrive," that "Wilson had attacked him in the manner described by the [petitioner] in his report," and that O'Callaghan had struck Wilson. "Finally, O'Callaghan testified that, before Middleton had drafted her report, he told her what he was planning to write in his own report." Id., 589.

E. The Defense Case: The defense presented testimony from several witnesses, including one officer who observed others strike Wilson, but could not identify them. Id., 590.

The petitioner testified in his own defense. He believed that his report was true when he wrote it, and he denied conspiring with O'Callaghan or Middleton to submit false reports. Id., 590. He acknowledged that some of the information in his report had come from O'Callaghan. Thus,

the petitioner "acknowledged that, contrary to his report, he did not observe O'Callaghan pull Wilson from the cab of the pickup truck and did not observe Wilson strike O'Callaghan in the chest"; but petitioner "included that information in his report because O'Callaghan had told the [petitioner] that that was what had happened." Id. The petitioner also testified that "although he had stated in his report that Wilson had struck him twice, Wilson actually was facedown on the ground at that time and '[i]t may have been other officers' who had struck the [petitioner]. The [petitioner] also acknowledged that he struck Wilson at least once, perhaps, twice, with his gun, and that it was possible that he also struck Wilson with his baton, but that he had failed to include this information in his report." Id.

F. The Prosecutor's Closing Argument: In closing argument, the prosecutor made the following comments:

(1) He "'held up a pair of blue tinted sunglasses to demonstrate the concept of a "blue code" [of silence], whereby police officers "avoid ratting on a brother officer."'" *Ancona II*, at 575, App. 5a.

(2) He "proceeded to credit the testimony of rookie officers and to discredit the testimony of the seasoned officers," and "posed a hypothetical to illustrate his opinion that the officers would have seen everything if Wilson, rather than a fellow officer, had been the defendant in the case." Id., 575-76 and n. 9, App. 5a-6a..

(3) He "accused the officers who hit Wilson of perverting the law and abusing their discretion . . . ." Id., 575-76 and n. 10, App. 6a.

In his rebuttal argument, the prosecutor made the following remarks:

(4) He "'discredited the statement and testimony of the defendant,'" and argued "'that even if the state's witnesses

were "liars," there was still no reasonable doubt.'" Id., 576, App. 7a.

(5) He "'stat[ed] his interpretation of the inferences that could be drawn.'" Id., 577 and n. 11, App. 7a.

(6) He "'blamed the seasoned officers for failing to prevent the assault on Wilson.'" Id., 577 and n. 12, App. 7a.

(7) He "'posed a series of rhetorical questions to the jury about the police officers' conduct.'" Id., 577 and n.13, App. 8a.

(8) At the close of rebuttal argument, the prosecutor talked about "a monument in Washington" dedicated to slain police officers who """died to protect us and [who] died to honor this, their badge"""–at which point the prosecutor "held up a badge that had been issued to the state's attorney himself"–and thereafter urged the jury not to let """those officers . . . get away with it."""" Id., 577-78 and n. 14, App. 8a-9a.[1]

After the rebuttal argument, the jury was excused, and defense counsel objected to the prosecutor's act of "'displaying his badge'" after referring to the monument in Washington. Id., 578 and n. 15, App.8a-9a.[2] In response, the prosecutor claimed

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[1] The prosecutor stated: """There's a monument in Washington that's set up that has about fourteen [thousand] or fifteen thousand plaques on it of officers who died in the line of duty. They died to protect us and they died to honor this, their badge. What those officers did that night is a disgrace. It's a disgrace to their badge. Don't let them get away with it."""" App. 8a.

[2] Defense counsel stated: "'I object to [the state's attorney's] displaying his badge and essentially putting these jurors as the representatives of the community at large. The jurors may not be asked to protect the community or to serve as judicial officers. They're here to decide the guilt of this individual. And saying that somehow the impact of this case will help preserve the integrity of our society and of law enforcement, I think, is prejudicial and objectionable, and cannot be cured by an instruction.'" *Ancona II*, at 578 n. 15, App. 9a.

it was "proper argument." The trial court ruled that it "fell within fair comment," and that the court was "not going to take any further action." *Ancona I*, at 35 n. 9, App. 56a; *Ancona II*, at 616, App. 47a. No specific curative instructions were given, but the court did give general instructions that the arguments of counsel are not evidence. Id., at 616, App. 47a.

II. STATE APPELLATE COURT PROCEEDINGS

A. The First Appeal: On appeal to the Connecticut Appellate Court, the petitioner's sole claim was that the prosecutor engaged in misconduct in closing and rebuttal arguments to the jury, and that said misconduct violated petitioner's due process right to a fair trial.[3] Specifically, the petitioner claimed that in his closing and rebuttal arguments, the prosecutor "improperly (1) displayed blue tinted sunglasses that had not been admitted in evidence in the case, (2) introduced the concept of the 'blue code,' (3) offered his opinion that the seasoned officers' testimony was unbelievable, (4) vouched for the credibility of the rookie officers' testimony, (5) blamed the seasoned officers for failing to help the victim, (6) posed hypotheticals to the jurors to encourage them to relate to the victim, (7) displayed a badge that was not part of the evidence and (8) appealed to the jurors emotions and inflamed the passions of the jurors." Id., at 31-32, App. 52a-53a. Because the petitioner had objected only to the prosecutor's *rebuttal* argument, the Appellate Court ruled that he had "failed to preserve properly the first six claims," and therefore the court would not "review them individually." Id., 36, App.57a-58a..

With respect to the preserved claims, the Appellate Court found that the prosecutor committed misconduct in displaying the badge and referring to the monument in Washington. Id.,

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[3] Although petitioner had invoked the due process clauses of both the federal and state constitutions, the Appellate Court decided the prosecutorial misconduct claim only under the federal constitution. *Ancona I*, at 31 n. 1.

38, App. 59a. The court also found that the prosecutor "improperly appealed to the emotions, passions and prejudices of the jurors," by focusing his arguments on "other police officers" who were not on trial, and on "law enforcement in general." Id., 38-40, App. 60a-61a. The court described the prosecutor's reference to the monument and slain officers as "a blatant attempt to divert the jurors' attention and appeal to their emotions, passions and prejudices by challenging the jurors not to 'let *them* get away with it.'" (Emphasis in original.) Id. Furthermore, by "using melodramatic language, by referring to a historical monument and by giving a hypothetical that had no basis in the evidence," the "prosecutor was attempting to color the jurors' minds with such emotion that they would consider it their duty to convict the [petitioner], regardless of the evidence." Id., 40, App. 61a.

Having determined that there was misconduct, the Appellate Court then assessed the misconduct under a six-factor test (first adopted in *State v. Williams*, 204 Conn. 523, 540 (1987)) that will be described infra. The Appellate Court "[v]iew[ed] the trial as a whole," and considered not only the comments to which objection had been made, but also considered those "that were the subject of the [petitioner]'s unpreserved claims." *Ancona I*, at 40, App. 62a. The court "conclude[d] that the egregious prosecutorial misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id., at 40-41, App. 62a. The Court thereupon reversed the judgment of conviction and remanded the case for a new trial. Id.

B. The Certified Appeal: After the decision in *Ancona I* was released, the state-respondent sought and obtained certification to appeal to the Connecticut Supreme Court, limited to the following issue: "Did the Appellate Court properly conclude that prosecutorial misconduct in the closing and rebuttal arguments deprived the defendant of due process

of law?"*State v. Ancona*, 260 Conn. 928 (2002). Subsequently, in an opinion issued on August 24, 2004, the Connecticut Supreme Court reversed the judgment of the Appellate Court, and remanded the case to the Appellate Court with direction to affirm the judgment of the trial court. *State v. Ancona*, 270 Conn. 568, 618 (2004) (*Ancona II*, at App. 1a-49a).

In its discussion of prosecutorial misconduct, the Connecticut Supreme Court reaffirmed its "'two step analytical process.'" Id., 595, App. 26a. The court determines "whether misconduct occurred in the first instance," and, if so, then determines "whether that misconduct deprived a defendant of his due process right to a fair trial." Id. "'Put differently, misconduct is misconduct, regardless of its ultimate effect on the fairness of the trial; whether that misconduct caused or contributed to a due process violation is a separate and distinct question . . . .'" Id.

Applying the *Williams* factors to the entire trial, the Connecticut Supreme Court found that the following misconduct had occurred:

– the prosecutor's comments about a "'blue code' of silence," and his argument that several of the testifying police officers "had acted in conformity with that code, amounted to improper unsworn testimony"; and his displaying of the blue tinted sunglasses, which was "inextricably linked to," and "served to highlight that improper argument," also was improper. Id., 599-601, App. 30a-32a.

– the prosecutor's "reference to the monument in Washington honoring thousands of deceased police officers exceeded the bounds of permissible closing argument"; it constituted an improper appeal "to the passions of the jury" and "to the jurors' emotions"; it "injected an extraneous matter into the trial," and it "likely distracted the jury from its duty of

deciding the case objectively and dispassionately." Id., 601-603, App. 32a-34a.

– the prosecutor's display of the badge, in order to "emphasize that the officers memorialized by the monument in Washington had died in the course of upholding the law," also was improper. Id..

– the prosecutor's additional comments urging the jury "not to 'let them get away with it,' and his assertion that the conduct of the [petitioner] and several other officers was 'a disgrace to their badge,'" also "was improper because, when considered as a whole, it reasonably might have been construed by the jury as suggesting that a verdict of not guilty would dishonor the memory of police officers who had lost their lives in the line of duty. To the extent that the state's attorney's argument may have conveyed that message, the argument was an inappropriate appeal to emotion." Id., 603, App. 34a.

– with respect to the prosecutor's statement, "'And I don't believe for a minute that all these officers were either true to themselves or spoke the whole truth,'" the Court agreed with petitioner that the prosecutor "should not have expressed his own belief that those officers had testified untruthfully," but in light of the court's instructions, that "isolated assertion of his belief that some of the officers had testified untruthfully did not rise to the level of misconduct." Id., 608-09, App. 39a-40a.

– the prosecutor's remark "that he 'blame[d]' the officers who were present at the scene for not stopping the alleged assault of Wilson," was "inappropriate" and "improvident," but did not jeopardize the petitioner's right to a fair trial. Id., 609-10, App. 40a-41a.

After finding these instances of misconduct, the Connecticut Supreme Court identified the following standard for determining whether the petitioner was denied due process

of law: "we must decide 'whether the sum total of [the state's attorney's] improprieties rendered the defendant's [trial] fundamentally unfair. . . .The question of whether the defendant has been prejudiced by prosecutorial misconduct. . .depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties.'" Id., 611-12, App. 42a-43a. The court found that the misconduct was: "brief," "isolated and sporadic"; that it was not severe; that the state's case against the petitioner on three of the charges was "very strong, if not overwhelming"; that certain improprieties were not objected to; and that the trial court gave a general instruction that the arguments of counsel are not evidence. Id., 611-18, App.42a-49a. The court concluded "that there is no reasonable likelihood that the state's attorney's misconduct compromised the defendant's right to a fair trial." Id., 618, App.49a. The court reversed the judgment of the Appellate Court, and remanded the case to that court with direction to affirm the judgment of conviction. Id.

This petition presents two questions related to the standards used by the Connecticut Supreme Court when reviewing claims of prosecutorial misconduct in argument. The petitioner acknowledges that the precise issues raised in this petition were not presented to the Connecticut Supreme Court. Under the circumstances of this case, however, that should not be deemed an impediment to this Court's consideration of the questions. This requires brief explanation.

In his first appeal to the Appellate Court, the defendant claimed that his federal right to due process of law had been violated by the prosecutor's misconduct, and the Appellate Court agreed with him. Having prevailed in *Ancona I*, there was no need or cause for petitioner to urge application of a *different* standard of review for the certified appeal in the Connecticut Supreme Court. This is especially true in light of the fact that under Connecticut law, a certified appeal is not a

"do-over" of the first appeal. Quite the contrary. The Connecticut Supreme Court has stated that in a certified appeal, "the focus of [its] review is not the actions of the trial court, but the actions of the Appellate Court." *State v. Torrence*, 196 Conn. 430, 433 (1985). See *State v. Nunes*, 260 Conn. 649, 658 (2002) ("on a certified appeal, our focus is on the judgment of the Appellate Court"). Thus, the petitioner's sole task in the Connecticut Supreme Court, as appellee, was limited to "defending" the Appellate Court's decision. For these reasons, petitioner respectfully requests that the Court give due consideration to this petition.

REASONS FOR GRANTING THE WRIT

"Like the Hydra slain by Hercules, prosecutorial misconduct has many heads."*United States v. Williams*, 504 U.S. 36, 60 (1992) (dissenting opinion of Stevens, J., with whom Blackmun, O'Connor, and Thomas, JJs., join). This case focuses solely on one of those "heads," i.e., improper remarks in closing argument to a petit jury–a type of misconduct that has been considered by this Court on relatively few occasions. See *United States v. Young*, 470 U.S. 1, 23 (1985) ("This Court only infrequently gives plenary consideration to cases involving standards of prosecutorial conduct.") (Opinion of Brennan, Marshall, and Blackmun, JJs., concurring in part and dissenting in part).

There is no uniform national standard for evaluating, on direct review, claims of prosecutorial misconduct in closing argument. As noted by Professor Wayne R. LaFave, who has been recognized by this Court as one among "[l]eading commentators," *Carter v. United States*, 530 U.S. 255, 279 n. 3 (2000), "[j]urisdictions vary in their approach under local law to the prerequisites for reversing a conviction based upon improper prosecutorial argument." 5 W. LaFave, *Criminal Procedure* (2nd ed. 1999) § 24.7(i), p. 563. Many jurisdictions

use, at least as a starting point, the "fundamental fairness" standard promulgated in *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974), and later reaffirmed in *Darden v. Wainwright*, 477 U.S. 168, 181 (1986), which asks whether the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process."[4] But in explaining and applying that due process test, courts have utilized diverse formulations, including the "reasonable likelihood" standard (which focuses on whether a particular outcome either "would" or "could" ensue)[5]; the "grave peril" standard[6]; the non-constitutional harmless error standard of *Kotteakos v. United States*, 328 U.S. 750, 776 (1946) (whether the error "had substantial and injurious effect or influence in determining the jury's verdict")[7]; and the constitutional

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[4] See, e.g., *State v. Singh*, 259 Conn. 693, 700 (2002); *United States v. Thomas*, 377 F.3d 232, 244-46 (2nd Cir. 2004); *United States v. Wilson*, 135 F.3d 291, 297 (4th Cir.). cert. denied, 523 U.S. 1143 (1998); *People v. Coffman and Marlow*, 96 P.3d 30, 100 (Cal. 2004); *State v. Haselden*, 577 S.E.2d 594, 606 (N.C.), cert. denied, 124 S.Ct. 475 (2003).

[5] Ancona II, 618, App. 49a ("there is no reasonable likelihood that the state's attorney's misconduct compromised the defendant's right to a fair trial"); *State v. Rizzo*, 266 Conn. 171, 249 (2003) ("whether there is a *reasonable likelihood* that the jury's verdict *would* have been different absent the sum total of the improprieties.") (Emphasis added.) *State v. Moody*, 94 P.3d 1119, 1154 (Ariz. 2004) (defendant must demonstrate that "'a *reasonable likelihood* exists that the misconduct *could* have affected the jury's verdict, thereby denying defendant a fair trial.'") (Emphasis added.).

[6] *Brown v. State*, 746 N.E.2d 63, 69-70 (Ind. 2001) (if reviewing court finds that "misconduct in fact occurred," court then "consider[s] whether the misconduct placed the defendant in a position of grave peril"; court "assess[es] grave peril based on the probable persuasive effect of the misconduct on the jury's decision, not on the degree of impropriety").

[7] *Bailey v. United States*, 831 A.2d 973 (D.C. 2003) (in determining whether prosecutor's improper comments resulted in "'substantial prejudice,'" "[t]he test for substantial prejudice is essentially the same as

harmless error standard of *Chapman v. California*, 386 U.S. 18, 24 (1967) ("before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.").[8]

These divergent approaches may be symptomatic of a larger "issue that has repeatedly divided the Court in the years since *Chapman* . . . whether particular conduct should be viewed as a constitutional violation in itself, with that violation then subject to the *Chapman* standard, or instead should be viewed as error only if the defendant can first establish a reasonable probability of that conduct having a prejudicial

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analysis under the harmless error rule: whether, 'after pondering all that happened without stripping the erroneous action from the whole,' we can conclude that the judgment was not substantially swayed by the error"; citing *Kotteakos*), cert. denied, 124 S.Ct. 1183 (2004).

[8] *State v. Hunt*, 615 N.W.2d 294, 301-02 (Minn. 2000) ("A defendant alleging prosecutorial misconduct generally will not be granted a new trial if the misconduct was harmless beyond a reasonable doubt . . . For serious prosecutorial misconduct, the misconduct is harmless beyond a reasonable doubt if the verdict rendered was surely unattributable to the error . . . For less serious misconduct, the test is whether the misconduct likely played a substantial part in influencing the jury to convict."); *Ture v. State*, 681 N.W.2d 9, 19-20 (Minn. 2004) (reviewing denial of postconviction relief, and concluding that the state's misconduct "was harmless beyond a reasonable doubt"); *State v. Brett*, 892 P. 2d 29, 49 (Wash. 1995) ("A defendant alleging prosecutorial misconduct generally will not be granted a new trial if the misconduct was harmless beyond a reasonable doubt; further, whether prosecutorial misconduct was harmless depends partly upon the type of misconduct committed"), cert. denied, 516 U.S. 1121 (1996); *State v. Smith*, 470 N.E.2d 883, 886 (Ohio 1984) ("It is not enough that there be sufficient other evidence to sustain a conviction in order to excuse the prosecution's improper remarks. Instead, it must be clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury would have found defendant guilty.") (citing *United States v. Hasting*, 461 U.S. 499 (1983)); *State v. Fears*, 715 N.E.2d 136, 158 (Ohio 1999) (Moyer, C.J., concurring in part and dissenting in part) (quoting harmless error standard from *State v. Smith*, supra), cert. denied, 29 U.S. 1039 (2000).

impact upon the outcome of the proceeding." LaFave, supra, § 27.6(d), pp. 947-48. Compare, *Darden v. Wainwright*, supra, 196-97 (dissenting opinion of Blackmun, Brennan, Marshall, and Stevens, JJs., arguing that "the Court finds, in essence, that any error [in the prosecutor's closing argument] was harmless"), with id., 183 n. 15 (Court's opinion stating it did not decide prosecutorial misconduct claim "on the ground that it was harmless error," since "that issue is not presented"; instead, the Court found that "the prosecutorial argument . . . was not constitutional error"). See also *Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2 (1993) ("Harmless error analysis is triggered only *after* the reviewing court discovers than an error has been committed . . . Since we find no constitutional error, we need not, and do not, consider harmlessness.") (Emphasis in original.); *Calderon v. Coleman*, 525 U.S. 141, (1998) (per curiam) (test for instructional error under *Boyde v. California*, 494 U.S. 370, 380 (1990) as to "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the constitution, "is not a harmless error test at all," but "is, rather, the test for determining, in the first instance, whether constitutional error occurred").

One commentator views *Donnelly v. DeChristoforo* "as the beginning of a trend towards determining whether a constitutional violation occurred by reference to whether the outcome of the proceeding would have been different had the violation not occurred," a type of analysis in which "effect on the outcome is used to define the constitutional violation rather than to determine whether a given constitutional violation was harmless." Note, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line*, 88 Colum. L. Rev. 1298, 1305 (1988) (hereafter "Note, *Harmless Error*").

That trend continued in *Strickland v. Washington*, 466 U.S. 668 (1984), where the Court adopted a two part test for

evaluating claims of ineffective assistance of counsel. Under *Strickland*'s formula, a defendant first must show that his counsel's performance fell below an objective standard of reasonableness, and then must show "prejudice"–by demonstrating a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., 694. The Court defined "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." Id.

A similar "outcome-determinative" test is also used for addressing violations of *Brady v. Maryland*, 373 U.S. 83 (1963), involving the nondisclosure of favorable evidence. See *United States v. Bagley*, 473 U.S. 667, 682 (1985) (suppression of favorable evidence is constitutional error "if there is a *reasonable probability* that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (opinion of Blackmun, J.) And in *Kyles v. Whitley*, 514 U.S. 419, 435 (1995), this Court observed that "once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review." The Court reasoned that "*Bagley* error could not be treated as harmless" because the existence of "'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different . . . necessarily entails the conclusion that the suppression must have had '"substantial and injurious effect or influence in determining the jury's verdict."'" *Kyles v. Whitley*, supra, 435.

Unquestionably, "[w]hether outcome-determinative analysis is used *to define constitutional errors* or *determine their harmlessness*," Note, *Harmless Error*, supra, 1308, can make a critical difference. When "outcome-determinative analysis" is used to *define* constitutional errors there are two discernible effects. "First, the burden of proving the impact of the error on the outcome of the proceeding is placed on the

defendant. Second, the amount of impact on the outcome that the defendant must show in order to obtain reversal of his conviction under the *Strickland* [or *Donnelly/Darden*]-type standard–a reasonable probability that the error affected the outcome–is greater than the impact that would entitle the defendant to reversal under *Chapman*–no reasonable possibility that the error contributed to the outcome." Id. See *Greer v. Miller*, 483 U.S. 756, 765 n. 7 (1987) ("the *Chapman* harmless-error standard is more demanding than the 'fundamental fairness' inquiry of the Due Process Clause"); *United States v. Benitez*, 124 S.Ct. 2333, 2339 n.7 (2004) ("If the burden is on a defendant to show prejudice in the first instance, of course, it would be easier to show a reasonable doubt that constitutional error affected a trial than to show a likely effect on the outcome or verdict.").

But why should state supreme courts be permitted to use the *Donnelly/Darden* standard on *direct* review of criminal convictions? *Donnelly* and *Darden* involved state prisoners who sought habeas relief in federal court, and the "fundamental fairness" inquiry of those cases was derived from, and designed for, principles of habeas review, not direct review. See *Darden*, supra, 181 ("appropriate standard of review . . . on writ of habeas corpus is 'the narrow one of due process'"). "[C]ollateral review is different from direct review," and, "[r]ecognizing the distinction between direct and collateral review," this Court has often "applied different standards on habeas than would be applied on direct review. . . ." *Brecht v. Abrahamson*, 507 U.S. 619, 633-34 (1993) (although *Chapman* applies on direct review of constitutional trial errors, the more-demanding *Kotteakos* harmless-error standard applies on habeas review).[9] See *United States v. Benitez*, supra, 2339 n.

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[9] "The test under *Kotteakos* is whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, supra, 637 (quoting *Kotteakos*, supra, 776).

7 ("When the Government has the burden of showing that constitutional trial error is harmless because it comes up on collateral review, the heightened interest in finality generally calls for the Government to meet the more lenient *Kotteakos* standard.") There are indeed important reasons for maintaining the distinction between direct and collateral review, including the doctrines of finality, comity, and federalism. Id., 635-36. However, none of those considerations is present in this case, where a petitioner's state conviction was reviewed on direct appeal by a state supreme court. See *United States v. Young*, supra, where this Court (on direct review) reviewed a prosecutorial misconduct claim for "plain error," but suggested, in a footnote, that *harmless error review* would have been necessary had the issue been preserved at trial: "Assuming the prosecutor's remarks exceeded permissible bounds and defense counsel raised a timely objection, a reviewing court could reverse an otherwise proper conviction *only after concluding that the error was not harmless*. See *United States v. Hasting*, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983)."[10] (Emphasis added.) Since *this* case is basically *that* case–a case on direct review where certain comments were objected to–certiorari should be granted to consider whether due process principles required the Connecticut Supreme Court (after finding that misconduct had occurred) to employ *Chapman*

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[10] In *United States v. Hasting*, the Court held that *Chapman* applies when a federal court uses its "supervisory power" to reverse a conviction because of the prosecutor's comment on the defendant's failure to testify. The critical question is whether, "absent the prosecutor's [misconduct], is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?" Id., 510-11.

harmless error analysis before it could affirm the petitioner's conviction.[11] See Note, *Harmless Error*, supra, 1309-23 (arguing that for claims of prosecutorial misconduct, the burden of proof with regard to the effect of the error on the outcome of the proceeding, must be placed on the prosecution).[12]

* * *

The second question presented in this petition, is concerned with whether the Connecticut Supreme Court's current standard is flawed because it "sort of" incorporates elements of the *Chapman* harmless error standard, without giving criminal defendants any real measure of *Chapman* protection. In effect, the Connecticut standard gives *Chapman* a cursory nod, but never removes its hat. To demonstrate this point, it is necessary briefly to consider three other Connecticut decisions that preceded *Ancona II*.

The first is *State v. Williams*, 204 Conn. 523 (1987), generally regarded as the Connecticut Supreme Court's seminal case on prosecutorial misconduct in argument. In *Williams*, the Connecticut Supreme Court adopted the *Donnelly/Darden* due process standard, which, as noted earlier, asks whether the

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[11] Certiorari is appropriate because "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court . . . ." Sup. Ct. R. 10(c).

[12] The illogic of placing the full burden of proof and persuasion on a defendant, in a case on direct review, is highlighted by the fact that *even on habeas review*, there are instances where the state bears the burden of proving harmlessness under the applicable standard. See *O'Neal v. McAnich*, 513 U.S. 432, 435-37 (1995) (when a federal judge on habeas review has "grave doubt" as to whether an error was harmless under *Kotteakos*, the "error is not harmless," and "the petitioner must win"). See also *United States v. Benitez*, supra, 2339 n.7 ("When the Government has the burden of addressing prejudice, as in excusing preserved error as harmless on direct review of the criminal conviction, it is not enough to negate an effect on the outcome of the case.").

prosecutor's conduct "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'"" *State v. Williams*, supra, 539. In addition, *Williams* articulated a six-factor test for determining "whether prosecutorial misconduct was so serious as to amount to a denial of due process," id., 540, and those factors have since been routinely employed by Connecticut courts when reviewing prosecutorial misconduct claims.[13]

One of the *Williams* factors is "the strength of the state's case," *State v. Williams*, supra, 540, and the *Williams* decision strongly suggests that that factor encompasses harmless error review. See id., 550 (concluding that the defendant "was denied a fair trial in violation of his *federal* and state constitutional rights to *due process of law*," and noting, "[n]or is this a case in which *the state's evidence was so strong* that we can say that there was *harmless error*"). (Emphasis added.)

The second significant case is *State v. Golding*, 213 Conn. 233 (1989), which prescribes the four conditions that must be satisfied by a litigant in order to obtain appellate review of a *constitutional* claim that was not raised at trial.[14] Of *Golding*'s

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[13] The relevant factors are: "the extent to which the misconduct was invited by defense conduct or argument . . . the severity of the misconduct . . .the frequency of the misconduct. . . the centrality of the misconduct to the critical issues in the case . . . the strength of the curative measures adopted . . .and the strength of the state's case." *Williams*, supra, at 540. It must be noted that in *Ancona II*, the Connecticut Supreme Court reconfigured this six-part test. The court combined the "severity" and "frequency" factors into a single factor, and then added a new number six factor: "whether the defendant objected to the misconduct." Id., 612, App. 43a.

[14] Under *State v. Golding*, supra, 239-40, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and

four conditions, the first two must be met in order to *obtain review* of an unpreserved constitutional claim; while the third and fourth prongs must be satisfied in order to *prevail* on the claim. *State v. Heredia*, 253 Conn. 543, 559-60 (2000).

Golding's fourth condition ("if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt") is a restatement of the *Chapman* standard, which provides that the beneficiary of a constitutional error bears the burden of proving that the error was "harmless beyond a reasonable doubt." In fact, in explaining *Golding*'s fourth prong, the Connecticut Supreme Court cited both *Chapman* and *United States v. Hasting*, supra. *State v. Golding*, supra, 241-42.

The third relevant case is *State v. Stevenson*, 269 Conn. 563 (2004), a decision issued by the Supreme Court in June 2004–which was after the decision in *Ancona I* (2002), and after the oral argument in *Ancona II* (January 2004), but two months prior to release of the decision in *Ancona II* (August 2004). *Stevenson* modified the rules governing the appellate review of unpreserved claims of prosecutorial misconduct.

Prior to *Stevenson*, litigants raising unpreserved (or only partially preserved) claims of prosecutorial misconduct, had to invoke *Golding* in order to obtain review of such claims. See, e.g., *State v. Singh*, 259 Conn. 693, 699 (2002); *State v. Burton*, 258 Conn. 153, 164-65 (2001). But in *Stevenson*, the Connecticut Supreme Court took the "opportunity to clarify

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clearly deprived the defendant of a fair trial; and (4) *if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt.* In the absence of any one of these conditions, the defendant's claim will fall. The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (First emphasis in original; second emphasis added.)

[its] due process analysis in cases involving incidents of prosecutorial misconduct that were not objected to at trial." Id., at 572. The Court concluded that heretofore, it would be unnecessary for appellants to "seek to prevail under the specific requirements of *State v. Golding*, . . ., and similarly, it is unnecessary for a reviewing court to apply the four-prong *Golding* test." *State v. Stevenson*, supra, 572-73. The "reason" for dispensing with the *Golding* test, "is that the touchstone for appellate review of claims of prosecutorial misconduct is a determination of whether the defendant was deprived of his right to a *fair trial*, and this determination *must involve* the application of the factors set out by this court in *State v. Williams*," supra. (Emphasis added.)

The *Stevenson* court explained that "specific application of the *Golding* requirements is simply superfluous when a claim of prosecutorial misconduct is presented," because "a claim of prosecutorial misconduct will, by its very nature, be of truly constitutional magnitude," and "the determination that a defendant has or has not been deprived of a fair trial *so as to warrant reversal* under *State v. Williams*, supra, 204 Conn. 540, is essentially a conclusion under the third *and fourth Golding* requirements"). (Emphasis added.) *State v. Stevenson*, supra, 574 n. 11. See id., 573-74 ("[t]he application of the *Williams* factors, therefore, is identical to the third and fourth prongs of *Golding*, namely, whether the constitutional violation exists, and *whether it was harmful*.") (Emphasis added.) See also *State v. Santiago*, 269 Conn. 726, 732 (2004) (reaffirming that the *Golding* test is superfluous in prosecutorial misconduct cases because the due process analysis" of *Williams* "embodies the third and fourth prongs of *Golding*, i.e., whether a constitutional violation occurred and whether it was harmful"). By thus "compressing" *Golding* into *Williams*, the *Stevenson* court made it clear (if it was not previously clear) that [*Chapman*] harmless error analysis plays some part in the

Connecticut Supreme Court's review of prosecutorial misconduct claims (particularly in a case where, as here, the court reviews both preserved and unpreserved claims of error). Yet, in *Ancona II* and elsewhere, the Connecticut Supreme Court has been inconsistent with regard to whether, or when, or how, it was using harmless error analysis in the context of a prosecutorial misconduct claim.

At one end of the spectrum is *State v. Alexander*, 50 Conn. App. 242 (1998), rev'd in part, aff'd in part, 254 Conn. 290, 302 (2000), where the Connecticut Supreme Court expressly disavowed harmless error analysis. In *Alexander*, the intermediate Appellate Court found that prosecutorial misconduct had occurred in closing argument. It reversed the defendant's conviction, observing that "we cannot say with any reasonable degree of certainty that the jury was not improperly influenced by [the state's closing argument]. Thus, the state has failed to establish that the improper remarks were harmless." Id., 50 Conn. App. at 259-60. Subsequently, the Connecticut Supreme Court affirmed the Appellate Court's decision on the prosecutorial misconduct issue, but noted that the Appellate Court "improperly placed the burden on the state to prove harmlessness. . . ." Id., 254 Conn. at 302 and n. 11.

Consistent with that statement in *Alexander*, the Connecticut Supreme Court has often stated explicitly that a defendant must prove prejudice under a "reasonable likelihood" standard. See, e.g., *State v. Rizzo*, 266 Conn. 171, 249 (2003) ("The question of whether the defendant has been prejudiced by prosecutorial misconduct, therefore, depends on whether there is a *reasonable likelihood* that the jury's verdict would have been different absent the sum total of the improprieties.") (Emphasis added.); *State v. Thompson*, 266 Conn. 440, 460 (2003) (same).

In other cases, however, the court has refrained from using the "reasonable likelihood" language, and has stated the test in different terms. See, e.g., *State v. Singh*, supra, 699-700, 725 ("In the absence of any independent evidence to corroborate the identity of the defendant as the arsonist, we cannot conclude that, had the jury not been exposed to these improper remarks, it would have concluded that the evidence proved beyond a reasonable doubt that the defendant had committed the arson. Accordingly, the defendant was deprived of a fair trial."); *State v. Ceballos*, 266 Conn. 364, 417 (2003) ("Indeed, we cannot conclude that, in the absence of other independent evidence to prove that the defendant had sexually assaulted S, the jury would have concluded that the evidence proved the defendant's guilt beyond a reasonable doubt . . . Accordingly, the defendant was deprived of his right to a fair trial . . . .") See also *State v. Rizzo*, supra, 272 ("we cannot say that, when it came to the ultimate weighing process, the state's case was so strong that it is not likely that the ultimate verdict of death would have nonetheless been the same absent the misconduct of the state's attorney").

Complicating this inquiry is the fact that in at least two other recent cases, the Connecticut Supreme Court has taken a hybrid approach, incorporating both the "reasonable likelihood" *and* "no reasonable possibility" standards. For example, in *State v. Peeler*, 267 Conn. 611 (2004), the court stated that "'[t]he question of whether the defendant has been prejudiced by prosecutorial misconduct, therefore, depends on whether there is a *reasonable likelihood* that the jury's verdict would have been different absent the sum total of the improprieties.'" (Emphasis added.) Id., 642. But one paragraph later, the court stated that with respect to the prosecutor's remarks "that were improper, we nevertheless are persuaded that there is no

reasonable possibility that they harmed the defendant." [15] (Emphasis added.) Id., 642.

Both standards were again used in *State v. Santiago*, supra, 736, where the court stated that "'[t]he question of whether the defendant has been prejudiced by prosecutorial misconduct, therefore, depends on whether there is a *reasonable likelihood* that the jury's verdict would have been different absent the sum total of the improprieties.'" (Emphasis added.) The *Santiago* court concluded that "the defendant was not deprived of his right to a fair trial because we do not find that 'there is a *reasonable likelihood* that the jury's verdict would have been different absent the sum total of the improprieties.'" (Emphasis added.) Id., 763. Yet, at an earlier point in its analysis of the *Williams* factors, the *Santiago* court stated: "In light of the strength of the state's overall case, however, we do not believe that it is *reasonably possible* that any of these improprieties *affected the result* of the trial." (Emphasis added.) Id., 760.[16]

It is undoubtedly difficult to maintain consistency when applying standards that, of necessity, are couched in terms of possibilities, probabilities, and the "likelihood" that certain events could or would occur. See *United States v. Benitez*, supra, 2342 (concurring opinion of Justice Scalia) ("By my count, this Court has adopted no fewer than four assertedly

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[15] The "no reasonable possibility" standard derives from *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963) ("[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction"), and of course, the *Fahy* standard is equivalent to the *Chapman* standard. *Chapman v. California*, supra, 24.

[16] The "reasonable possibility" language appears in many of these same cases when the court is discussing prosecutorial misconduct *in the examination of witnesses*. See *State v. Williams*, supra, 538-39;*State v. Singh*, supra, 700; *State v. Ceballos*, supra, 376; *State v. Stevenson*, supra, 580.

different standards of probability relating to the assessment of whether the outcome of trial *would* have been different *if* error had not occurred, or *if* omitted evidence had been included.") (Emphases in original.); *Boyde v. California*, supra, 378-80 (majority opinion, discussing "reasonable likelihood" standard), and id., 387-94 (dissenting opinion, discussing same standard); *Strickler v. Greene*, 527 U.S. 263, 297-301 (1999) (Souter and Kennedy, JJs., concurring in part and dissenting in part) (discussing meanings of "reasonable probability," "reasonable likelihood," "reasonable possibility," and "more likely than not"). But that is all the more reason for insisting that states comply strictly with federal harmless error mandates.

The harmlessness of a federal constitutional error is itself a federal question, *Chapman*, supra, 20-21, and *whenever* a state court applies harmless error analysis in reviewing a federal constitutional "trial error," that court must use the *Chapman* standard, and properly place the burden of proof on the state. The Connecticut Supreme Court, however, employs a standard that appears to encompass harmless error review, but which only *sometimes* gives defendants the benefit of an analysis under a "reasonably possible" standard (and without specifying who has the burden of persuasion), and which *usually* (as in *Ancona II*) uses the "reasonable likelihood" standard and places the burden fully, and solely, on the defendant. A writ of certiorari is therefore warranted, since a state supreme court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Connecticut Supreme Court.

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